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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 889

VALCO MORTGAGE COMPANY, INC., JOHN WARREN and MARIE B. WARREN, Petitioners

v.

536 BROAD STREET CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS

JOHN WARREN,
Counsel for Petitioners.

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NOTE:

The record on the appeal from the decree is referred to as "R." followed by the Roman numeral of the volume followed by the page number and, in the case of an exhibit, followed by the page number where the exhibit was offered; the record on the petition for the vacation of the order of reference is referred to as "P.R." followed by the page number; the record on the challenge is referred to as "C.R." followed by the page number; all parties are styled as stated on the first page of the index to the record on appeal from the decree; exhibits are indicated by "Ex." followed by "C" if respondent's or "D" if petitioners' and the number thereof.

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536 BROAD STREET CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Valco Mortgage Company, Inc., a corporation of New Jersey, John Warren and Marie B. Warren, respectfully petition for a writ of certiorari to the New Jersey Court of Errors and Appeals to review a judgment entered on June 27, 1946 (R. 2646) affirming a decree of the Court of Chancery made December 18, 1944 (R. I, 90). Said decree was based upon a written opinion of the Honorable Henry T. Kays, Vice-Chancellor (R. I, 61) reported in 135 N. J. Eq. 361. The opinion of the New Jersey Court of Errors and Appeals affirming the decree reported in 138 N. J. Eq. 431, was *per curiam* on the said opinion of Vice-Chancellor Kays (R. 2645) by a vote of 7 to 6 (R.

2648C), Judge Dill, who voted to affirm, being a layman not learned in the law.

Included in the review are two interlocutory orders of the Court of Chancery of New Jersey.

One order dated March 9, 1943 (P.R. 248), denied a petition for vacation of the order of reference to Vice-Chancellor Kays because of his political domination by Frank Hague, Warren's enemy, and was made upon a written opinion of the Chancellor (P.R. 242), reported in 133 N. J. Eq. 240. The New Jersey Court of Errors and Appeals, on December 9, 1943, affirmed said order (P.R. 253), which affirmance was based upon a written opinion (P.R. 249), reported in 134 N. J. Eq. 224.

The other interlocutory order, dated November 6, 1944, denied the challenge of petitioners for the recusation of Henry T. Kays, Vice-Chancellor, because of his use of his opinion as a release in a campaign for adoption of a new constitution, in which he and Warren were opposed (C.R. 56), and was based upon a written opinion of the Vice-Chancellor (C.R. 46) reported in 135 N. J. Eq. 581. The New Jersey Court of Errors and Appeals, on May 15, 1945, affirmed (C.R. 67) *per curiam* on the opinion of Vice-Chancellor Kays, with a concurring opinion by two of the Justices and two of the Judges (C.R. 66), which opinions are reported in 136 N. J. Eq. 513.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended; 28 U. S. C. A. 344(b). The judgment of the New Jersey Court of Errors and Appeals was entered June 27, 1946 (R. 2646). A petition for reargument was duly filed with that Court, which, on September 13, 1946, denied the same (R. 2678). The time in which the petitioners may make application for a writ of certiorari was enlarged and extended to, and including, January 15, 1947, by order of Mr. Justice Harold H. Burton entered November 29, 1946.

Constitutional Provision Involved

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States of America, prohibiting any state from depriving any person of life, liberty or property without due process of law and from denying to any person within its jurisdiction the equal protection of the laws.

Questions Presented

1. Whether petitioners were denied due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment:

   (a) When the Court below ruled that political domination of the Vice Chancellor before whom the cause was tried, by the enemy of Warren, was legally insufficient to disqualify him.

   (b) When the Court below ruled that alleged acts of the Vice Chancellor causing petitioners to believe that he was not an impartial and independent jurist, were legally insufficient to disqualify him.

   (c) When the Court below summarily denied petitioners the right to adduce proof of their allegations that the Vice Chancellor was politically dominated as a judicial officer in this cause by Warren's enemy and had given petitioners cause to believe that he was biased and prejudiced against them, particularly since he found the allegations untrue in fact.

2. Whether the decree below is so patently erroneous as to deny fundamental justice to petitioners, and thus deny to them due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment:

(a) When the Court below applied to this cause a rule as to the power of the Chancellor to find a fact contrary to all evidence, which rule was, and is, flatly opposed to the rule long established, and repeatedly enunciated, by the New Jersey Courts in other cases.

(b) When the Court below failed to dismiss this cause on the grounds of estoppel, acquiescence and laches.

Statement

In 1922, Barnet retained Warren's law firm to contest the will of his uncle, of which, testator's widow, Tillie O. Barnet, was sole beneficiary, there being no children. The will was set aside and, while an appeal was pending the suit was settled by the conveyance of the mortgaged property to Barnet, who gave back the mortgage in suit, due May 1, 1934, bearing interest at 2% per annum, until there was a change in tenancy.

Barnet formed Broad, conveyed the mortgaged real estate to it for stock, transferring one-third to his attorneys for services. Broad refused to accept rent under existing leases, instituted ejectment, and was enjoined. Its only asset was its real estate and, during the litigation, had no funds to pay taxes, mortgage interest, insurance premiums and repair bills, which, if unpaid, would have produced a foreclosure of the mortgage, which would have wiped out the stock.

Warren financed Broad by loaning it money and endorsing or guaranteeing its notes, in the total sum of $295,523.70 (Ex. C-4, R. VII, 2012-159, Schedule A, 1-3).

The litigation with the tenant was settled at a profit to Broad of $80,111.56 plus taxes, repair costs and insurance premiums, which the tenant agreed to pay up to the expiration of its lease on October 31, 1933 (R. II, 548, 552).

Warren managed Broad. His investment of moneys received because of the settlement resulted in a profit of $29,442.30 (Ex. C-4, Schedule 4, R. VII, 2020).

In December, 1932, Maag, on behalf of Tillie O. Barnet, sought a payment on the mortgage at a discount, which she repudiated, and refused an extension, which Warren sought. On January 18, 1933, Warren's treasurer's report to Broad, referred to the correspondence with Maag and Tillie O. Barnet's statement to him, and recommended that Broad attempt to acquire the mortgage at a substantial discount (Ex. C-40, R. VIII, 2575-194). The directors of Broad did nothing about the matter, but authorized Warren to negotiate with the tenant for a renewal of the lease. The tenant offered $10,000 per annum, Barnet demanded $25,000, the tenant moved out October 31, 1933, and Broad's income ceased. On November 4, 1933, Barnet and Warren conferred about the difficult situation confronting Broad, to wit, the vacant building, the mortgage falling due May 1, 1934, which the mortgagee demanded be then paid in full, thus preventing Broad from negotiating a term lease beyond that date. That day Warren wrote Tillie O. Barnet, suggesting an extension of the mortgage (Ex. D-66, R. VII, 2206-587). She refused, as she had previously (Ex. D-64, R. VII, 2204-564).

In the spring of 1933, Warren, through an involuntary bankruptcy, lost all his Broad stock. On November 4, 1933, he informed Barnet that he had performed all his obligations to him and that he would retire from Broad to devote his entire time to the practice of law to rehabilitate himself financially (R. II, 600, 601).

Up to January 10, 1934, Warren had made a profit for Broad of $109,553.86, which was the source of its then liquid assets, and for all of his services, as attorney and treasurer, for the seven preceding years, had received $10,200, while Barnet had received, under the guise of salary, $35,333.22. Complainant's accountant's report

shows that, prior to this date, Warren had loaned to, or made expenditures for, Broad which have not been paid to him, totalling $6,442.79, which, with interest to January 10, 1934, amounted to $7,907.46 (Ex. C-4, R. VII, 2002, 159), evidencing that Warren subordinated his financial interest to that of his friend and client, Barnet.

On January 10, 1934, Warren's connection with Broad terminated. Stanton was elected counsel and Mrs. Barnet elected director and treasurer (Ex. D68, R. VII, 2209-605; D242, R. VIII, 2585-1976).

Between January 10, 1934 and February 27, 1934, Warren did not devote time to Broad's business. Barnet did. Warren, as an act of friendship, aided Barnet as time permitted (Ex. C14, R. VII, 2032, at 2033-189; C13, VII, 2031-189; D67, VII, 2208-393). During this period, Barnet, who, prior to January 10, 1934, had not attended to Broad's affairs, did so until March 19, 1934, coming to its office two or three days a week for such purpose.

Between February 7, 1934 and February 14, 1934, Fiedler, a real estate broker, visited Warren and informed him that the mortgage had been placed in his hands for sale at a substantial discount; that it might be purchased by someone who would foreclose it and wipe out Broad; and that he had been instructed not to offer it to Broad, Barnet or Warren, but, because of his friendship for Warren, he thought that he should know about it.

Warren told him he would try to get a buyer for him, and on that day went to Barnet and told him of the entire conversation and suggested that Broad buy the mortgage through a dummy corporation to be formed, in order to conceal its interest from Tillie O. Barnet, but Barnet would not do it because he wished Broad to keep its liquid assets for the time being, but did want an extension of the mortgage for a year and urged Warren to raise the money to buy the mortgage for himself and grant such an exten-

sion, or have a client do it (R. I, 144-149; II, 617-630; III, 875-879; 901-940).

Warren was in daily touch with Barnet and Stanton with respect to his efforts to obtain financing to purchase the mortgage. He organized Valco for that purpose with Barnet's knowledge.

He applied to Greenberg for a loan, who refused it, but offered to pay $30,000 to Tillie O. Barnet for an assignment of the mortgage to Valco, take all of Valco's stock and hold it as his own, have Valco give to Tillie O. Barnet its one year note for $25,000, and not pay it before its due date, which would give Broad the one year extension Barnet desired, and offered Warren an option to purchase his Valco stock if, within thirty days, his investment of $30,000 was returned to him with interest (R. I, 146, 149-153; II, 630-635).

Before Warren accepted Greenberg's proposition, he discussed it with Barnet, who approved because it would give Broad "a year's time in which to find itself, to know what it could do with the property" and give Warren an opportunity to raise money to buy Valco stock, and so control the mortgage, Barnet saying he would be better satisfied with Warren controlling it than if a stranger did (R. II, 635-636).

On February 27, 1934, Greenberg paid $30,000 to Tillie O. Barnet, and had Valco execute its note to her for $25,000, payable in a year. She assigned the mortgage to Valco, which reassigned it to her as collateral security for the note, which note, collateral assignment and second assignment from her to Valco, to be delivered if its note be paid, were deposited in escrow in the Trust Department of the National State Bank. The first two assignments were promptly recorded and disclosed that the consideration of the assignment to Valco was $55,000 and its reassignment as collateral security for the note (Ex. C45,

R. VII, 2071-214; Ex. D9, R. VII, 2105-638). The assignment back, which was then unrecorded, is Ex. C46 (R. VII, 2076-215). The escrow agreement is Ex. D70 (R. VII, 2216-642) (R. II, 637, 639-642).

By this arrangement, if the note to Tillie O. Barnet had not been paid, the payment of $30,000 to her would be lost, as it would not be credited on the mortgage, and she would hold the mortgage for its full amount (R. II, 641, 642). The whole transaction, showing the price paid for the mortgage and the escrow, was spread upon the public records for anyone to read.

In this period, Warren urged Barnet to have Broad exercise Warren's option on Greenberg's Valco stock for Broad's benefit, which Barnet would not do, but urged Warren to attempt to raise money to exercise the option (R. II, 646-648).

Shortly before Warren's option expired, Barnet proposed to Warren that Broad pay enough money to Valco to enable it to pay the amount of Greenberg's investment and something on account of the sales price of Greenberg's Valco stock, because he wanted to eliminate Greenberg, but save future mortgage extension expenses, and proposed that Warren manage Broad so long as Barnet and Mrs. Barnet lived, without salary, to be compensated, if at all, by moneys Broad would thereafter pay Valco on the mortgage, saying that Broad would have to pay the $150,000 mortgage to Greenberg or someone else and, by this arrangement, would obtain Warren's services for nothing; that Valco must look solely to the real estate for the collection of its mortgage, and cancel the bond, so that neither Barnet nor Broad would be liable for a deficiency and Broad stockholders would thus be protected; that when Warren acquired the Valco stock from Greenberg, he should give it to Mrs. Warren to protect her against any subsequent business reverses, which Warren might have, which suggestion was made because Barnet said

Warren had not protected his wife and children in the past, which he should have done, and that he had lost all through his bankruptcy (R. III, 905-907; II, 648-654; III, 907).

Barnet expressed sorrow that Warren, whose services had been so valuable to Broad, had, through bankruptcy, lost his Broad stock, his compensation for services in the will contest and that, by the arrangement he suggested, Warren would have a stake in Broad sufficient to justify him to give his services without expense to Broad, relying solely upon the mortgage, and that if anyone was to get a profit out of the mortgage, he would rather see Warren make it than Greenberg.

Greenberg agreed to permit Warren to pay the purchase price of Valco stock in installments. Because the payment of $30,000 to Greenberg would not end his interest in Valco, which he continued to hold until the full purchase price of the Valco stock was paid to him by Warren (R. II, 653-665; 665-666), the dealings between Valco, which he controlled, and Broad, which Barnet controlled, were absolutely formal and at arms length, which explains the form of the minutes of the meeting of March 19, 1934 (Ex. D104, R. VII, 2281-908), Warren's letter to Barnet of March 16, 1934 (Ex. C16, R. VII, 2036-190), and Valco's letter to Barnet dated March 19, 1934, stating that, on the reduction of the mortgage to $100,000, it would give Barnet a covenant not to sue (Ex. C1, R. VII, 1999-103), which was never given because by the time the mortgage had been so reduced, Valco stock had passed to Warren and Warren had cancelled the bond in accordance with his agreement so to do.

After the Warrens got control of Valco and, through it, the mortgage, formality between Broad and Valco ceased (R. II, 664-667).

On March 19, 1934, a meeting of all Broad's directors was held. Warren was present and Mrs. Heller was in

and out of the meeting. The entire transaction concerning the purchase of the mortgage by Greenberg, his ownership of the Valco stock, and Valco's inability to credit any payment to be made by Broad upon the mortgage because it was in escrow in the National State Bank, was discussed. The escrow agreement was read (Ex. D-70, R. VII, 2216-642). That the directors at all times knew of the terms of purchase and the escrow is evidenced by Ex. C3 (R. VII, 1999-156) and Broad's minutes (Ex. D75, R. VII, 2227-709).

Barnet told the directors of his proposal to Warren and insisted it be consummated (R. II, 658-670; 678-691; 911-912).

The minutes of that meeting (Ex. D104, R. VII, 2281-908) show that "there was a discussion with regard to the mortgage on the company's property, and which was recently assigned by Tillie O. Barnet to Valco Mortgage Co., Inc.", and that Valco proposed that the mortgage be extended to February 15, 1935, if the sum of $35,000 was paid thereon, "which at the expiration of the period of extension will be credited on the amount of the principal sum".

All directors, including Stanton, an experienced real estate lawyer, director of banks, a title company, building and loan associations and other corporations, and counsel for, and the secretary and a stockholder of, Broad, voted for a resolution accepting that proposal and authorizing the execution of an agreement to effectuate it (Ex D10, R. VII, 2109-656), and authorizing the payment of said $35,000 and interest of $1750 to Valco. These payments were made that day (Ex. D71, R. VII, 2220-670).

Broad was not otherwise obligated to make any payment to Valco at that time, and, because of Greenberg's agreement, would not be until the due date of the $25,000 note on February 27, 1935.

The payment was made as performance of its contract then made with Warren. The next day, Valco paid Greenberg $30,110 (Ex. D4, R. VII, 2099-671) in part performance of that contract and Warren embarked upon his service for Broad in performance of the contract, and continued so to do during the lives of Barnet and Mrs. Barnet, as agreed.

Yet, the minutes are otherwise silent concerning the contract, which is included in the "discussion" there noted.

All other minutes drawn by Stanton are meagre and omit mention of important actions of the directors. He cannot explain his minutes of March 19, 1934. The provision for postponement of credit of so large a sum of money, he said was "unusual" (R. I, 346, 354, 347), but that he could not understand it or remember any of the occurrences at that meeting (R. I, 346, 354) or why the resolution for which he voted, spread on the minutes which he wrote, carried out by the agreement, Exhibit D10 (R. VII, 2109-656), which he drew, signed and proved, contained the provision for the postponed credit of that payment, or what it meant, but that he then had no doubt that Broad was protected by its execution of Exhibit D10; that he knew what he was doing when he executed it; and that he then thought Broad was paying the money safely (R. I, 346, 350).

Yet, he testified that he did not know who Valco was; whether or not it had been incorporated; if the mortgage had been assigned to it; if it had any assets; if it could repay Broad the $35,000, if it could not later credit the mortgage therewith; that he made no investigation of the record to ascertain whether or not Valco held the mortgage. Time had so faded his memory (R. I, 243) that he, the sole surviving director of Broad, had no recollection of the discussion, of occurrences, at the meeting. He does not deny the testimony of Warren and

Mrs. Heller as to the occurrences at the meeting. He simply could not remember them. Their evidence as to the making of the contract is uncontradicted.

On February 27, 1935, Valco discounted its note for $40,000, secured by collateral it had purchased from Gibraltar, some securities of Broad, a $5,000 certificate of deposit, and an assignment of an interest in the mortgage in suit, which note was endorsed by Barnet and Warren (Ex. D5, R. VII, 2100-710). Out of the funds raised on this note, Valco's note to Tillie O. Barnet was paid and her assignment, reciting the payment of the note (Ex. D9, R. VII, 2105-638), delivered.

The following day, Warren wrote to Barnet explaining the consummation of the loan and the disbursement of the moneys, including payment by Valco of a note discounted by Broad (Ex. C3, R. VII, 1999-156).

Because Tillie O. Barnet had been completely paid, Meehan and his associates resigned as officers of Valco, because there was no further reason to camouflage the situation from her, and Mrs. Warren took control. She then owned all Valco stock purchased from Greenberg. Shares were then transferred to Mrs. Warren, Mrs. Heller and Mr. Garrigan to qualify them as directors, and new officers were elected. Warren, on March 6, 1935, wrote to Barnet (Ex. C35, R. VII, 2055-192), and told him of the election of Mrs. Warren as president, Mrs. Heller as secretary, and Warren as treasurer, and of Mrs. Warren, Mrs. Heller and Mr. Garrigan as directors, saying:

> "It is an assurance to you that so long as the Valco can hang on to the mortgage, you need not fear foreclosure."

During the years, the relations of Warren and Barnet were friendly and informal. So, consequently, were the relations of Valco and Broad. They were mutually helpful. This is evidenced by payments made by Valco and

Warren for Broad's benefit, the assignment by Warren and Mrs. Warren of $50,000 in life insurance policies, and Warren's execution of a bond of that amount as collateral for Broad's indebtedness in that sum to Guardian, and Valco's subordination of its mortgage to that of the Guardian to enable Broad obtain that loan. The Guardian still held Warren's insurance policies and bond at the time of trial.

When Valco's note was paid and the bank and Gibralter reassigned the mortgage, Warren cancelled Barnet's bond secured thereby, in accordance with his contract with Broad.

Barnet became ill in August, 1938, in which month Mrs. Barnet told Warren that he was too ill to see him, but that she would let Warren know as soon as Barnet's condition permitted a visit. She never did.

In September, 1938, the Belfattos, her brother-in-law and nephew, both lawyers, visited Warren and asked about Broad's affairs. Warren fully informed them as to the purchase of the mortgage and the contract with Broad, under which he was then working.

Thereafter, and in January, 1939, Mr. Collins, a member of the firm of Carpenter, Gilmour & Dwyer, visited Warren, saying he was counsel for the Belfattos, and inquired as to Broad's affairs. Warren fully informed him as to them, the purchase of the mortgage and Mrs. Warren's ownership of Valco, as a result of which Broad was reorganized on February 14, 1939, Vincent Belfatto became president; Mrs. Barnet, vice-president; Collins, treasurer; Warren, secretary; and Warren's secretary became assistant secretary. Warren, as representative of Mrs. Warren's Valco interest, was given joint control over Broad's bank account (Ex. D244, R. VIII, 2588-1977; D245, R. VIII, 2591-1978), and Warren continued right up to the time of trial to work for Broad under his contract, during which time Vincent Belfatto was Broad's president.

On June 5, 1939, G. M. Belfatto wrote to Warren, saying that he was about to file a suit in the Court of Chancery against him and others, and that Barnet and his wife would be complainants (Ex. D21, R. VII, 2126-777). Warren responded (Ex. D22, R. VII, 2127-777) that he knew of no claim that he could make against him and that Belfatto did not represent Barnet. The entire correspondence is illuminating (Exs. D22-D38, R. VII, 2127-2158-778, 802; D40, R. VII, 2163-818).

When Belfatto first charged Warren with dereliction, Warren immediately responded that Barnet could disprove it and demanded conferences with Barnet (Exs. D23, D30, D32), and continued to do so orally, but Belfatto refused (D31), and Barnet was concealed from Warren until the time of his death on September 30, 1939.

Warren also continually asserted his innocence and demanded that Belfatto examine the records of Broad, which would disprove his charges (Exs. D23, D30, D32, D34, D37, D38), which both Belfattos refused to do (Ex. D40), even up to the time of trial.

When Warren received Exhibit D36, in which Belfatto made an offer of settlement, including the cancellation of the mortgage, "to avoid serious trouble and scandals in Court", Warren wrote to him (Ex. D37, at 2157), advising him that "No lawyer can settle baseless demands which challenge his honor. To do so would be to submit to blackmail", and he wrote to the Secretary of the Ethics Committee of the Essex County Bar Association charging Belfatto with unprofessional conduct and enclosing the entire correspondence (Ex. D39, R. VII, 2159-1972). He also wrote to Chancellor Campbell informing him of the correspondence (R. VIII, 2610).

When Collins learned of Belfatto's correspondence, he resigned as a director and treasurer of Broad. Thereafter, Meyer Ruback, Carey & Lane, and former Vice-Chancellor Fallon, were engaged by the Belfattos as counsel. They all

investigated the matter and withdrew. Vice-Chancellor Fallon employed the accountant who made the audit disproving Belfatto's charges (Ex. C4, R. VII, 2002-159).

After Mr. Fallon withdrew (Ex. D-280C, R. VIII, 2609-1995), Broad's present attorney was employed in the early part of 1941, and he filed the bill of complaint on March 4, 1942, without ever conferring with Warren, without ever looking at the records of Broad, which were called to Belfatto's attention in Exhibit D32, and without informing Warren that he proposed to file a bill of complaint against him charging fraud.

The decree cancels the mortgage on a finding therein (R.I. 91) "that the said John Warren obtained from the said Tillie O. Barnet, on February 27, 1934, the assignment of the said $150,000.00 mortgage, to the said Valco Mortgage Company, Inc., for $55,000.00 by the improper use of confidential information and in violation of a duty which he owed to the Broad Street Corporation as its attorney."

It further orders (R.I. 91) Valco and Warren to pay to Broad the amount in excess of $55,000 paid by it to them with interest. The Special Master found that excess to be $49,014.11 and the interest thereon to April 10, 1945 to be $24,193.62 or a total sum of $73,207.73, bearing interest of $4,392.46 per annum. But the decree did not allow credit to Valco and Warren for the cost of acquiring and financing the mortgage, indebtedness of Broad to them or for the value of Warren's services to Broad over a period of nine years.

Specification of Errors to Be Urged

The court below erred:

1. In ruling that the grounds of disqualification of a Vice-Chancellor provided by R. S. 2:26-193 are exclusive, and that (a) political domination of him, (b) his bias, prejudice or partiality, or (c) his own acts, which cause

litigants to believe him to be otherwise than unbiased and impartial, are not grounds for his disqualification.

2. In summarily denying petitioners the right to adduce proof of their allegations of the political domination of the Vice-Chancellor and that he had given petitioners cause to believe that he was biased and prejudiced against them, he having denied the truth of the allegations.

3. In finding facts unsupported by evidence and in contradiction of the evidence adduced by, and the pleading of, Broad, when the rules of law otherwise required.

4. In holding that Broad was not estopped, had not acquiesced and was not in laches, in face of the uncontradicted evidence to the contrary and in disregard of the judicial precedents binding upon it.

Reasons for Granting the Writ

The right of a litigant to a determination of his cause by an unbiased, unprejudiced, impartial Judge, and one who has not, by his acts, given a litigant cause to believe that he is otherwise, is the foundation of our jurisprudence and our system of government. Confidence in our government and our courts requires its protection. The decisions of the court below deny that right not only to petitioners, but to all citizens of New Jersey.

This right should exist whether the cause for the disqualification of a Judge arises before or after trial begins but the court below held that a challenge for a cause occurring after trial begins, is not timely, thus requiring the citizens of New Jersey to submit to a determination by a Judge who is corrupted or otherwise gives cause for disqualification, after trial begins.

The decree below, affirmed by the New Jersey Court of Errors and Appeals by a vote of 7 to 6, one of the Judges

voting to affirm being a layman not learned in the law, is based upon findings of fact wholly unsupported by evidence, in the face of overwhelming evidence to the contrary and in violation of the established rules of the New Jersey courts.

The decree below, affirmed as aforesaid, fails to apply the rules established by the New Jersey courts with respect to estoppel, acquiescence and laches to overwhelming, uncontradicted evidence, which required their application.

The questions thus presented to this court are important, and petitioners believe that a review of the decisions of the court below with respect to them is fully warranted.

I

The decisions of the Courts below that the statutory grounds of disqualification of a judge are exclusive, denied petitioners a fundamental right to justice.

(Federal questions raised P. R. 5, 39, 40; C. R. 4, 5, 6a, 6b, 6c, 32, 33, 45, 59, 61; R. 1, 21-24, 26-29, 95, 96, VIII, 2639-2642.)

In the opinion, denying the petition, 133 N. J. Eq. 240 (P. R. 242), Chancellor Campbell held that R. S. 2:26-193 does not provide for the disqualification of a Judge because of his bias, prejudice or political control, and that the prejudice of a Vice-Chancellor arising out of political relations is not sufficient to disqualify him. Without comment as to this, the opinion was affirmed, 134 N. J. Eq. 224 (P. R. 249). The statement that a Judge cannot be disqualified because of politics was reiterated by Vice-Chancellor Kays in his opinion denying the challenge, 135 N. J. Eq. 581 (C. R. 46), which was affirmed, *per curiam*, 136 N. J. Eq. 513 (C. R. 67).

In Vice-Chancellor Kays' opinion, in which he held the challenge to be insufficient in law, he also referred to R. S. 2:26-193, treated it as being exclusive, and said that the

challenge disclosed none of the causes provided in that statute.

In that opinion he held that the challenge, on its face, showed that it was not timely, citing *Vanderbach* v. *Hudson County Board of Taxation,* 130 N. J. L. 3, and *Curtis* v. *Joyce,* 90 N. J. L. 7, aff'd 91 N. J. L. 685, which merely decided that a challenge for a cause occurring before trial or argument must be filed before trial or argument.

This challenge was for a cause occurring after trial and of course a challenge therefore could not have been filed before the trial started. The challenge therefore was timely. *Matter of City of Rochester,* 208 N. Y. 188, 198; *Yazoo and M. V. R. Co.* v. *Kirk,* 102 Miss. 41.

To hold that a judge cannot be disqualified for an act occurring during, or after, trial which, if it occurred before trial, would have disqualified him, violates all sense of justice. To hold that a challenge based upon the corruption of a judge occurring after trial started is not timely, would be to hold that unless a judge is corrupted before the trial, that he could be corrupted with impunity and immunity, after the trial has commenced.

The corruption of a judge after trial started, resulting in a dishonest decision, is as great a violation of morals, public policy and rights of litigants as if he had been corrupted before trial.

It is clear then that the stated four decisions enunciate the law in New Jersey to be that (a) the statute R. S. 2:26-193 is exclusive, (b) because the statute is exclusive that the political domination of a judge, destroying his impartiality so as to have him render an unrighteous decision, is not cause for his disqualification on the complaint of the litigant against whom such decision is, or may be, rendered, (c) that if a cause for disqualification arises after the commencement of a trial that a litigant whose rights are impaired thereby may not legally complain.

It was because of these rules so enunciated that the petition and the challenge were held to be insufficient in law.

Statutory grounds of challenge are not exclusive of those imposed by the common law, 33 C. J. 989.

The fundamental right of a litigant to have his cause determined by an impartial judge is protected by the due process clause of the Fourteenth Amendment. 30 Am. Jur. 783, *State* v. *Board of Education*, 19 Wash. 8; *Day* v. *Day*, 12 Idaho 556, 12 Am. Jur. 326; *Union Drainage Dist.* v. *Smith*, 233 Ill. 417; *Moses* v. *Julian*, 45 N. H. 52.

Bias and prejudice because of politics is cause for disqualifying a judge. 33 C. J. 1001; *Kentucky Journal Publishing Co.* v. *Gaines*, 139 Ky. 747.

On January 27, 1943, in face of a doctor's certificate that Warren's health required that he rest for two weeks, and the statement of Warren that he could not prepare new counsel in that time, if he obeyed the orders of his physician, Vice Chancellor Kays set the cause down for trial on February 9, 1943 (Ex. 42, Pet. R. 204-221). If the Vice Chancellor's act, under the circumstances, was legally correct, as the Court of Errors and Appeals said it was (134 N. J. Eq. 224 at 227), nevertheless, it forced Warren to determine whether he would violate the doctor's orders by preparing new counsel to try the case on that date and risk further injury to his health or to obey the doctor's orders and go to trial of this stale cause on the date set without preparation of new trial counsel, or of himself, for trial. The petition alleges that the actions of the Vice Chancellor that day constituted his participation in the Hague organization's planned publicity of this cause (Pet. R. 35-39; Exs. 44-55, Pet. R. 228-241).

When Hague opened the 1944 political campaign on July 11, 1944, which was, in fact, a campaign against the

adoption of the new constitution, which would wipe out the Court of Chancery, he made Warren, a lawyer not active in politics, a main subject of attack because of his charges against Hague members of the State Board of Tax Appeals (C.R. 20-26).

The Vice Chancellor's opinion on the main case was dated August 15, 1944. His secretary wrote a letter to Warren dated August 23rd stating that he had filed it (Pars. 17, 18, C.R. 28). The challange alleges that he withheld the filing of the opinion until August 29th and, before then, delivered a copy thereof to the Democratic political organization controlled by Hague so that organization could, and it did, prepare a political press release most helpful to the organization and hurtful to Warren, which it sent to newspapers for publication on August 29th, the date that they knew that the opinion would be filed (Par. 20-22, C.R. 29-30); that by his said conduct, he caused a more widespread publication of the news of his opinion than would otherwise be the case and, in a vein most hurtful to Warren and most helpful to Hague and his political organization in their efforts to defeat the proposed new constitution which, if adopted, would wipe out the Court of Chancery and most helpful to Hague in his defense of the members of the State Board of Tax Appeals whom he controlled and his defense of Warren's libel suit against him (C.R. 30).

The aforesaid acts of the Vice Chancellor caused petitioners to believe that he was acting and would act, as a politician and not as a judge.

It is fundamental law, imbedded in a sense of justice of all right thinking men, that "Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the Judge." 30 Am. Jur., Judges, sec. 53, p. 767.

This statement of law is repeated in 33 C. J., Judges, sec. 128, p. 998, which adds:

> "The immediate rights of litigants are not the only objects of the rule, but public policy demands its observance."

This rule of law, which requires the recusation of the judge, or the reversal of his determination, is implicit in the opinion of this court in *Tumey* v. *Ohio,* 273 U. S. 510. It is enforced wherever the Judge, by his own acts, has given cause to a party to believe that he is otherwise than impartial, and this is done in cases where there is no proof, or finding by the court, that he was not impartial. Wherever the question has been raised, except in the instant case, the courts have enforced this stated fundamental right of litigants. The rule was long ago well stated in *People* v. *Roe,* 18 Wend. (N. Y.) 550, is still the law of New York; *Matter of the City of Rochester,* 208 N. Y. 188, 192, and has been stated in *Moses* v. *Julian,* 45 N. H. 52; *Leonard* v. *Wilcox,* 101 Vt. 195; *Payne* v. *Lee,* 24 N. W., 2nd (Minn.), 259, 263 (not officially reported); *Kentucky Journal Publishing Co.* v. *Gaines,* 139 Ky. 747; *U'Ren* v. *Bagley,* 118 Ore. 77; *Harris Estate* v. *West Grove Savings Bank,* 207 Iowa 41; *McCormick* v. *Walker,* 142 N. Y. S. 759, at 764; *State* v. *Dewell,* 131 Fla. 566; *State* v. *Childers,* 188 Okla. 14; *State* v. *Board of Education,* 19 Wash. 8; *State* v. *Robinson,* 35 N. D. 410; *Boxley* v. *Wright,* 84 Okla. 45; *People* v. *District Court,* 60 Colo. 1; *Rochester S. & E. R. Co.* v. *Tolen,* 101 N. Y. Supp. 433; *Yazoo & M. V. R. Co.* v. *Kirk,* 102 Miss. 41; *Crook* v. *Newborg,* 124 Ala. 479; *Metsker* v. *Whitesell,* 181 Ind. 126; *Norton* v. *Inhabitants of Fayette,* 134 Me. 468; *McCoy* v. *Handlin,* 35 S. D. 487; *Cotulla State Bank* v. *Herron,* 202 S. W. 297 (Texas), (not officially reported); *Stockwell* v. *Township of White Lake,* 22 Mich. 341.

The allegations were sufficient to sustain the petition, and the challenge, as pleadings. The grounds of disqualification stated in R. S. 2:26-193 are not exclusive. The challenge was timely. The orders, and because thereof, the decree, denied fundamental justice to petitioners and thus violated the Fourteenth Amendment. *Buchalter* v. *New York,* 319 U. S. 427.

It may seem unusual for a litigant, particularly a member of the Bar of long standing, to assert that a court is dominated by a political boss and that the Judge before whom his case is tried is politically so dominated and will decide the case against him as a matter of political vengeance.

It might might be assumed that such a charge, if made, would be made by a defeated litigant because of his defeat.

Such is not the situation in the instant case.

The charge was made in the petition before the case was tried, in the challenge before the decree was signed and was argued vigorously on the appeals from both orders.

What your petitioners asserted in that petition and challenge is a matter of common knowledge. It is a historical fact that for years, under Chancellors Walker and Campbell, the Court of Chancery of New Jersey has been dominated by Hague and that the confidence of the public in that court has been lost.

What your petitioners asserted was no more than has been asserted by the public in New Jersey for years, by the Bar, by the man on the street, by the editors, by our Governors and by our new Chancellor, the Honorable A. Dayton Oliphant, who, when he took office in October 1946, said "Domination of the Court of Chancery by any individual or political party is at an end." They are most familiar with the fact. Their duties required them to be.

Courts cannot shut their eyes to matters of public history, or to truths all others can see, where such matters are familiarly known to people familiar with the particular matter in question. *Sparrow* v. *Strong*, 3 Wall 97; *Shapleegh* v. *Mier*, 299 U. S. 468; 20 Am. Jur., Evidence, Secs. 16, 18, 19, pp. 47-50.

Appendix B will serve this Court as an index to the historical fact, of common knowledge to all citizens of New Jersey. The daily and Sunday New Jersey papers whose clippings are reproduced have a circulation of 565,145. (Editor and Publisher International Year Book—1946, pp. 83-84.) The inaugural address and radio speech of Governor Edison and the statement of Chancellor Oliphant were given publicity in all New Jersey daily newspapers,—circulation 958,422. (Editor and Publisher International Year Book—1946, pp. 83-84), and daily papers of New York City and Philadelphia, having a large circulation in New Jersey. Their interest is shown by the New York Herald-Tribune editorial. The material in Appendix B consists of clippings by petitioner, Warren, from time to time, from papers which he regularly reads.

The misconduct of Vice-Chancellors and the loss of confidence in the Court of Chancery on the part of the Bar and public in 1933 caused the New Jersey State Bar Association to petition the Chancellor for an investigation of the Court of Chancery. The petition, as described by the Chancellor (*Petition of New Jersey State Bar Ass'n*, 112 N. J. Eq. 606) provided:

> "These representations appear, from the said petition, to have gone in five directions:
>
> 1. That the administration of receivership and trust estates had been a matter of patronage rather than trust, resulting in the allowance of large and exorbitant fees by Vice Chancellors to receivers and counsel.

2. That the situation last referred to had by the Governor and the public press been referred to as a 'receivership racket.'

3. That there existed a well-settled impression in the public mind that it is necessary to retain certain members of the bar in order to secure the appointment of receivers or to successfully avoid such appointment, such employment calling for the payment of exorbitant fees resulting in obtaining the desired results regardless of the exact justice of the particular causes.

4. That so-called 'ambulance chasing' in receivership matters had become a practice through and by means of certain lawyers procuring claims of creditors and stockholders of corporations and making the latter a prey to insolvency and receivership proceedings.

5. That the repeated appointment by certain Vice Chancellors of the same person as receiver and a certain coterie of solicitors, counsel, masters and other officers had created the belief in the public mind that receivership and other fees had directly or indirectly been 'split' by such officers among themselves, and that certain Vice-Chancellors had participated therein directly or indirectly."

On appeal, *In re New Jersey State Bar Ass'n,* 114 N. J. L., 261, the Court of Errors and Appeals, said:

"It had long been apparent that certain of the officers (of the Court of Chancery) lacked in public confidence. Certain favored appointees were rewarded with a lavish hand and private property rights were not uniformly safeguarded. Judicial proprieties, to say the least, were often disregarded, as well as the inherent rights of litigants, witnesses, and counsel."

II

The decisions of the Courts below denying petitioners the right to adduce proof of the allegations of the petition and challenge, denied a fundamental right to justice.

(Federal Question Raised C.R. 4, 5, 58, 59, 61).

Both the petition (P.R. 6) and the Challenge (C.R. 17) allege that the Court of Chancery was dominated by Frank Hague and his political organization; that Vice-Chancellor Kays was a member thereof; that Hague and his organization controlled and dominated the Court of Chancery; that because of Warren's activities in proceedings to remove Hague members of the Hudson County Board of Taxation, and of the State Board of Tax Appeals and as an attorney on behalf of persons oppressed by Hague, that he incurred Hague's wrath; that Hague libelled him; that Warren sued Hague for libel; that his attorney in this cause was John Milton, who, when the libel suit was instituted, and shortly before date set for trial of this cause, surrendered his retainer and became attorney for Hague in the libel suit (*Hague* v. *Warren*, 137 N. J. Eq. 117); that Hague had seized upon this litigation to oppress Warren and that Vice-Chancellor Kays was dominated by Hague and would decide this cause against petitioners, regardless of its merits; and certain acts of the Vice-Chancellor which caused your petitioners to believe that he was so politically dominated, was biased and prejudiced against them, and would not act herein as an impartial, unprejudiced jurist.

The petition asks for a vacation of the order of reference to Vice-Chancellor Kays, (P.R. 47), and the challenge prays for his recusation (C.R. 33).

Prayer 3 of the petition (P.R. 48) asked for an order permitting petitioners to take depositions to support cer-

tain of the allegations, and the challenge prayed that proceedings thereon be held in accordance with law (C.R. 33), if the Vice-Chancellor would not rescue himself, which would require petitioners to adduce evidence in support of the challenge. *State* v. *DeMaio,* 70 N. J. L. 220.

An order denied the petition (P.R. 248), so that your petitioners were denied the opportunity to offer proof as to the truth of the allegations of the petition, yet, the Court of Errors and Appeals (134 N. J. Eq. 224, at 226), with respect to the charge that the Court of Chancery was politically controlled and Vice-Chancellor Kays prejudiced against petitioners, said:

> "On a careful examination of the petition and the proofs, however, we fail to find any factual support of this claim".

With respect to the challenge, the record discloses that when it was filed, Vice-Chancellor Kays said that he would "fix the time for a hearing in the matter" (C.R. 41). Yet, on November 3, 1944, without further notice to your petitioners and without affording your petitioners an opportunity to adduce proof in support of the challenge, he denied the challenge on the ground that it was "untrue in fact" (C.R. 53).

Thereafter, Warren insisted to Vice-Chancellor Kays that he should have an opportunity of adducing evidence to prove the challenge and to deny that would deny due process of law under the Fourteenth Amendment (C.R. 58-61).

The allegations of the petition and of the challenge were serious and asserted legally by an officer of the court. If true, the determination of the cause, in which petitioners were parties, by a Vice-Chancellor who was politically controlled and acted as petitioners alleged in said petition and challenge denied them fundamental justice.

The proceedings on the petition and challenge in the appellate court did not call for a determination by that court, nor does this petition call for a determination by this court, that the Vice-Chancellor was, in fact, politically corrupt or that he acted so as to give just cause to your petitioners to believe that he would not accord them justice.

All that the Appellate Court below was asked to do was to reverse the orders so that your petitioners might adduce evidence to prove the allegations of the petition and challenge.

That is all we ask this Court to do.

After Hague's speech on July 11, 1944, in which he attacked Warren and the proposed new constitution, which would wipe out the Court of Chancery (P.R. 35-39; Ex. 43-45, P.R. 228-241), his members of the State Board of Tax Appeals filed their answer to Warren's charges against them, asserting that "his accusations and attitude in this case are of the same nature and attitude toward a member of the Chancery Court described in the opinion of the Court of Errors and Appeals in *536 Broad Street* v. *Valco Mortgage Co.* 134 N. J. Eq. 224" (Par. 16, C.R. 27). That was true. But, as to them, Warren was afforded the right to adduce evidence to prove his charges against them. He did so and Governor Edge removed them. Warren was given the opportunity to prove similar charges against Hague-controlled members of the Hudson County Board of Taxation. On the proof he then adduced Governor Edison removed them. *In the Matter of the Application of the Hudson County Board of Taxation,* 128 N. J. L. 574.

The amotion of those members of quasi-judicial tribunals indicates that Warren does not make "scurrilous" charges against members of New Jersey tribunals and that, when he makes charges against them, he can support them by adequate proof.

The denial of petitioners' right to adduce proof in support of their petition and challenge denied them fundamental justice. *Buchalter* v. *New York, supra.*

With respect to the challenge, we insist that the opinion of Vice-Chancellor Kays (C.R.46), denying the truth of the allegations of the challenge, was not a decision of the court, but merely notice to your petitioners that the facts alleged for his disqualification were denied by him.

Upon such denial by a challenged Judge, the duty is cast upon the challenger to prove the truth of the challenge. *State* v. *DeMaio, supra; Moses* v. *Julian,* 45 N. H. 52.

The orders and judgments of the Court of Chancery and of the Court of Errors and Appeals, denying to your petitioners the right to adduce proof in support of the allegations of their petition and challenge, violated all fundamental concepts of justice and due process of law, guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

III

The decree below was based upon findings of facts unsupported by evidence and the Courts below failed to apply rules of law binding upon them thus denying the fundamental right to justice.

(Federal Question Raised R. VIII, 2643)

The decree is based upon findings of fact by the Court that:

a) Barnet did not know of the opportunity to purchase the mortgage at a discount;

b) that there was no contract between Broad and Warren;

c) that Broad and Barnet did not know of the Warren interest in Valco;

d) that Warren purchased the mortgage from Tillie O. Barnet and

e) that at the time he was the attorney for Broad;

f) that there was no estoppel, acquiescence or laches;

g) that Broad was not indebted to Valco and Warren.

The stated findings of fact are without any evidence to support them. They were made in disregard of long established and binding precedents, applied in all cases except this case, and the Court below refrained from applying established rules of law to the evidence, applied in all cases except this case.

The decree is so patently erroneous as denying fundamental justice to petitioners, that this Court should review the evidence. *United Gas Public Service Co. v. Texas,* 303 U. S. 123; *Great Northern Railway Co.* v. *Washington,* 300 U. S. 154, 165; *Norris* v. *Alabama,* 294 U. S. 587; *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1; *Johnson Oil Co. v. Oklahoma,* 290 U. S. 158; *Davis* v. *Wechsler,* 263 U. S. 22; *Williams* v. *North Carolina,* 325 U. S. 226; *Aikens* v. *Texas,* 325 U. S. 398; *Hoover v. Evatt,* 324 U. S. 652; *Merchant Nat'l Bank* v. *Richmond,* 256 U. S. 635; *Carlsen* v. *Curtiss,* 234 U. S. 103; *Cresswell* v. *Grand Lodge,* 225 U. S. 246; *Ancient Egyptian Order* v. *Michaux,* 279 U. S. 737.

(a)

Broad's own evidence proved conclusively that Barnet had full notice of the opportunity to purchase the mortgage and was fully informed of the transaction and approved it. This evidence came from petitioners Warren and Mrs. Warren, whom Broad called as its witnesses (R. I, 145, II, 520, 524-526). Broad also proved this notice by its own

exhibits (R. VII, C. 3, 1999-156, C. 4, 2006, 2007-149, C. 32, 2052-192, C. 35, 2055-192). Broad was bound by its evidence. Veenstra & DeHaan Coal Co. v. Pepper, 125 N. J. Eq. 243, opinion by Kays, V. C., affirmed 126 N. J. Eq. 218.

In disregard of this binding precedent the Vice-Chancellor found a fact contrary to the evidence binding upon Broad in order to render a decision in its favor. To make this finding he also had to disregard Broad's own minutes and documents which it executed and other exhibits listed in Appendix C.

The uncontradicted evidence of Warren, who testified for petitioners, is that Barnet was fully informed of the opportunity to purchase the mortgage at a discount and refused to do so because he wanted to keep the liquid assets of Broad for the time being and obtain an extension of the mortgage for one year, within which time he could judge as to the future of Broad's property, which had at the time been vacant for four months, during which time Broad was without income and there was then no prospect of a rental.

Mrs. Heller testified that Barnet had told her Warren had been out to see him and told him what Fielder had said about the mortgage (for sale at a discount) and that he hoped Warren would raise the money to buy it for himself; that thus Broad would be protected; that Warren would not foreclose; but, if another buyer got it they might foreclose it; that Barnet told her that the amount Warren had to raise to buy the mortgage was $55,000 (R. III, 903), and she testified on cross examination that Barnet told her that he wanted Broad to hold its money to pay taxes and for repairs (R. III, 943).

The Vice Chancellor discarded Mrs. Heller's testimony as not "convincing" because he said that on, direct examination, she had testified that "she had drawn up a stock option" and that she "had typed it", but afterwards stated that she "never saw or typed it" (R. I,

81), but the Vice Chancellor was wrong in his statement concerning her testimony for, on both her direct examination (R. III, 905) and her cross examination (R. III, 944), she said that she was not certain that she typed it but that she had seen it. Even if he were right in that respect, such would not be sufficient cause to disregard all of her testimony.

No reason was assigned by the Vice Chancellor for discarding the evidence of Warren and Mrs. Warren adduced by Broad, or its exhibits, or the evidence of Warren adduced on the petitioners' case, but he did so when he said: "It is unbelievable that Fred M. Barnet was so stupid that he refused to purchase" the mortgage (R. I, 81).

Barnet was an experienced man of affairs, well educated, highly intelligent, alert, very opinionated and definite in his ideas. He had been private secretary to John D. Rockefeller for years and a manufacturer. He checked the files and records of Broad each time he came to the office or Warren went to his home and looked over everything carefully. He was thorough in all things (R. II, 561, 562; III, 898, 890, 930).

Vice Chancellor Kays is the operating president of a bank and in making his quoted finding, he made it in the light of Warren's long years of successful effort to save and profit Broad.

The Vice Chancellor substituted his business judgment as a banker as to what he thought Barnet should have done 10 years before in the place of the uncontradicted unimpeached evidence as to what Barnet, an experienced business man, did do, in the exercise of his judgment affecting his financial interest.

This finding, unsupported by any proof and in disregard of all evidence upon the matter, was not permitted by the long established rule enunciated in *Berckmans* v.

Berckmans, 17 N. J. Eq. 453, affirming 16 N. J. Eq. 122; *Day* v. *Topping,* 95 N. J. Eq. 660; *Baldauf* v. *Russell,* 88 N. J. L. 303, 306; *Cartan* v. *Phelps,* 91 N. J. Eq. 312; *Rains* v. *Rains,* 127 N. J. Eq. 328, 330; *Eustace* v. *Metropolitan Life Ins. Co.,* 115 N. J. L. 541; see also, *United States* v. *Johnson,* 1 Wall. 326.

(b)

The evidence of Warren that Barnet proposed that Broad and Warren enter into a contract, whereby Broad would pay money to Valco to get rid of Greenberg and aid Warren in purchasing the Valco stock owned by Greenberg, and that Warren would manage Broad's business so long as Barnet and his wife should live, and supply it with office accommodations and clerical help without cost to Broad, on the chance that he and Mrs. Warren would profit from the mortgage, Barnet suggesting that the Valco stock be given to Mrs. Warren to protect her and her children, and that Broad and Warren did enter into such a contract on March 19, 1934, and that it was fully executed by both,—is uncontradicted and unimpeached (R. V, VI, Exs., Appendix C).

The testimony of Mrs. Warren adduced by Broad (R. II, 520, 524-526), is, likewise, uncontradicted and unimpeached, and, as has been shown under (a), it is binding upon Broad and the court.

As stated under (a), the Vice Chancellor disregarded all of the testimony of Mrs. Heller, but he did not assign a legal cause for so doing, and her testimony is uncontradicted and unimpeached.

With respect to the making of the contract, she testified to conversations with Barnet, in which he told her that Warren was trying to raise the money to pay out Greenberg and exercise his option to purchase Greenberg's Valco stock; that he hoped Warren could do so,

so that he could get the mortgage from Greenberg, have it for himself, and have an interest in Broad; that Barnet suggested that Broad pay $35,000 to Valco to pay off Greenberg and enable Warren to acquire the stock and the mortgage (R. III, 905-906); that Barnet spoke to Warren about Broad's affairs and said he would feel better and happier if Warren took over the business management of Broad, and that then everything would be cared for properly and all would be protected; that, a year later, when Warren was endeavoring to raise the money to pay the note of $25,000 held by Tillie O. Barnet, Barnet was concerned as he wanted Warren to retain his interest; that if Warren lost out, they would all lose out (R. III, 912); that Barnet was happy when Warren was able to obtain the Valco stock from Greenberg, and said that all would be protected, that Warren would care for the affairs of Broad, and his mind was at rest; that he did not have to worry about it (R. III, 913); and, at his home, Barnet told Mrs. Barnet that "We are all very lucky that Judge Warren had obtained the mortgage and that they had all stood a chance of losing everything" (R. 111, 914).

On cross examination, Mrs. Heller said that Barnet had said that as long as Warren had the mortgage, it would not be foreclosed, and he was happy because of that and because Warren would get something out of Broad, for which he had worked so long and so hard, through payment of the mortgage; that he knew Warren would get the difference between the $55,000 paid for the mortgage and the amount of the mortgage, if paid, which would partly pay for his work and efforts on behalf of Broad; that he felt badly that Warren lost his Broad stock in his bankruptcy; that Warren would get some benefit out of Broad; and that the compensation Warren would receive through the mortgage was compensation for his past and future work (R. III, 941-943).

Warren's evidence (R. V, VI) and the exhibits (Appendix C) prove the contract.

Broad did not offer any evidence to contradict this mass of evidence that the contract was made; that Warren had performed services under it for nine years; and that they were of benefit to Broad, and that Broad had accepted those benefits; nor did it offer any evidence to explain why it accepted those services, or that they were rendered and accepted for any reason other than under the contract, as Warren testified.

Yet, the Vice-Chancellor disregarded all of the uncontradicted and unimpeached evidence, aforesaid, and found "There was no such contract, not only because of the improbability of its alleged provisions, but also because its existence cannot be inferred from any of the many writings which are in evidence. Any efforts which Warren put forth in the interest of Broad also benefitted him as a stockholder, or his wife, or Valco, which he owned or controlled" (R. I, 86).

There was no improbability as to the provisions of the contract because it was completely executed and the manner of its execution was in evidence, the parties to the contract having placed their interpretation upon it by their acts for nine years, those of Warren rendering the services, those of Broad accepting the benefits of the services.

The Court erred, also, in its statement concerning the benefits to Warren or his wife, for, when the contract was made, neither Warren nor his wife owned any stock in Broad or Valco, or owned or controlled Valco, or any interest therein. In this respect the Vice-Chancellor again failed to follow the binding precedents cited under (a).

The case of *Keasbey* v. *Wilkinson*, 51 N. J. Eq. 29, is directly in point as an authority that the acts of the parties over the course of years proved the making of a con-

tract and the terms thereof. The Vice-Chancellor sought to avoid the application of this decision on the grounds (1) that the contract was there admitted (which was untrue) while, here, Broad denied its contract with Warren, but there is no such denial except in its general replication (R. I, 51), and (2) that there is no documentary evidence of the existence of such contract, but this ignores all of the exhibits (Appendix C).

(c)

That Barnet and Broad did know of Warren's interest in Valco appears in paragraph 7 of the bill of complaint (R. I, 32). Broad is bound by that pleading, *Hageman* v. *Brown,* 76 N. J. Eq. 126, and by its exhibits (Ex. C4, R. VII, 2002-159; Ex. C3, VII, 1999-156; C35, VII, 2005-192, in which Warren wrote Barnet that "Valco has now elected Mrs. Warren as president * * * myself as treasurer * * *. It is an assurance to you, that, so long as the Valco can hang on to the mortgage, you need not fear foreclosure"; Subordination agreement, Ex. C47, R. VII, 2086-220).

Knowledge of the Warren interest in Valco is further evidenced by other exhibits (Valco notes endorsed by Barnet and Warren, Ex. D6, R. VII, 2102-725; D5, VII, 2100-714; Minutes, D165, VIII, 2442-1498; Agreement assigning Warren's life insurance policies as collateral for Broad's debt, D42, VII, 2165-755; Warren's collateral bond, D91, VII, 263-753; D32, VII, 2140-778; see, also, testimony of Warren and Collins as to knowledge of the Belfattos, cited elsewhere, and all of the record in Volumes V and VI).

(d)

That Greenberg bought the mortgage from Tillie O. Barnet and that Warren did not, is uncontradicted. The

finding otherwise is not in accordance with the precedents cited in (a).

(e)

Warren was not the attorney for Broad when Greenberg purchased the mortgage.

The Vice-Chancellor (R. I, 82) cites complainant's exhibits to show that he was (R. VII, C11, 2029-188; C12, 2030-188; C13, 2031-189; C14, 2032-189; C15, 2034-190; C16, 2036-190). He ignored the fact that Exhibits C11 and C12 were written while Warren was the paid treasurer of Broad and the uncontradicted evidence with respect to all those exhibits, which, however, was not, by citation, called to the attention of the Court of Errors and Appeals (R. I, 188-190; II, 590, 591, 593, 654; III, 1034-1936; IV, 1039-1040, 1148-1156).

The Vice-Chancellor also ignored the fact that Stanton was then the attorney for Broad and drew the extension agreement, the cover of which bears his name (Minutes, D242, R. VIII, 2585-1976; D10, R. VII, 2109-656).

Because the Vice-Chancellor wrongly held that Warren was then Broad's attorney, he further wrongfully held that the cases (R. I, 83), requiring the one who asserts a fiduciary relation to bear the burden of establishing it, were not applicable. The effect of this decision is to hold that a person who performs business services, if he be an attorney, must bear a burden of proof not required to be borne by other men, not attorneys, performing similar services, and that the mere assertion in a pleading that a defendant was attorney for a complainant, without any proof that he is such, throws the burden of disproving it upon the defendant.

Petitioners suffered a fact finding without evidence and were deprived of the benefit of decisions with respect to the burden of proof.

(f)

On the faith of the contract made between Broad and Warren on March 19, 1934, Warren faithfully performed all of his duties thereunder for nine years up to the time of trial. This performance is detailed day by day (R. VI, VI), to the extent that the records of Broad refresh his recollection.

The numerous exhibits dated after March 19, 1934, consisting of leases which, by their terms, were made subordinate to the Valco mortgage; tax appeal petitions noting the Valco mortgage and the amount due thereon; checks of Broad to the order of Valco, or for its benefit, and charged against the mortgage on Broad's books; minutes of Broad; estoppel certificates with respect to the Valco mortgage, certifying as to its validity; Warren's bond and the assignment by him and Mrs. Warren to the Guardian of life insurance policies of $50,000 as security for Broad's debt, and still held by the Guardian at the time of trial; Warren's letters to Barnet, the Belfattos and others; the extension agreement between Broad and Valco; Valco's notes endorsed by Barnet and Warren noting the assignment of the Valco mortgage as security for Valco's note; Barnet's affidavit of title; fire insurance policies on Broad's property, with loss payable to Valco as mortgagee; Broad's income tax returns; receipts for payments by Valco and Warren on Broad's taxes,—all evidencing Warren's contract, his work thereunder, the knowledge of Broad, through Barnet, Mrs. Barnet, Stanton and Belfatto, of the Warren interest in Valco and of Warren's services under the contract,—are listed in Appendix C.

Broad does not dispute that Warren performed such services, but it did not offer any evidence to contradict his testimony that he performed them under the contract; nor did Broad offer any evidence that such contract was not made, or explaining why Warren rendered such services without compensation, or why it accepted the benefits thereof.

A summary of the occasions of services by Warren and his staff for Broad, evidence that Warren worked for Broad on at least 2256 days after March 19, 1934 (R. VII, 1857-1860).

The following exhibits should be specially mentioned: The commitment letter of the Guardian (Ex. D86, R. VIII, 2253-741), which stated that its loan of $50,000 would be conditioned upon the delivery of Warren's personal bond for $50,000 and an assignment of insurance policies on his life for $50,000 as collateral for Broad's debt, and that the Guardian's mortgage be a first lien. This commitment letter is repeated in the minutes of Broad of September 11, 1936 (Ex. D165, R. VIII, at 2443-1498), when Barnet reported that he had accepted it, which act was ratified (R. 2445). Barnet reported that he had arranged with Valco to subordinate its mortgage, "upon which the sum of $105,000 is now due, to the lien of the mortgage to be given * * * to the Guardian Life Insurance Company" (R. 2446). Warren's life insurance policies were assigned to the Guardian by an agreement executed by Broad, Mrs. Warren and Warren (Ex. D42, R. VII, 2165-755), which, with his collateral bond of $50,000 (Ex. D91, R. VII, 2263-753) were held by the Guardian at the time of trial, and Valco's subordination agreement was executed by Mrs. Warren as its president (Ex. C47, R. VII, 2080-220), all in compliance with the conditions of the Guardian commitment.

These exhibits evidence conclusively Broad's knowledge of Mrs. Warren's ownership of Valco, as well as Broad's contract with Warren. If the validity of the Valco mortgage was to be disputed by Broad, that was the time to do so. If it had, of course, it would not have received the loan from the Guardian because then Mrs. Warren and Warren would not have executed the subordination agreement, the assignment of insurance policies and the collateral bond.

These few exhibits, selected out of many, standing alone and unexplained, in themselves are sufficient to require the application of the rules of estoppel, acquiescence and laches.

The rule with respect to estoppel is established by the following authorities, ignored by the court below whose attention was directed to them: *Keasbey* v. *Wilkinson,* 51 N. J. Eq. 29; *Lutjen* v. *Lutjen,* 64 N. J. Eq. 773; *Bennett* v. *Millville Improvement Co.,* 67 N. J. L. 320; *Whitfield* v. *Kern,* 122 N. J. Eq. 332; *Solimine* v. *Hollander,* 128 N. J. Eq. 228, 276; 19 Am. Jur. 676, Sec. 62, Estoppel; *McSweeney* v. *Equitable Trust Co.,* 127 N. J. L. 299; *United Box Board & Paper Co.* v. *McEwan,* 76 Atl. 550; *United States Steel Corporation* v. *Hodge,* 64 N. J. Eq. 807; *Feist & Feist* v. *A. & A. Realty,* 105 N. J. L. 461; *Elfenbein* v. *Luckenbach Terminals,* 111 N. J. L. 67; *Shaten* v. *American National Bank,* 109 N. J. Eq. 307; *Kuebler Foundries* v. *H. J. Koehler Motors Corp.,* 100 N. J. L. 163; *Pittsburgh, etc.* v. *Koekuk & Hamilton Bridge Co.,* 131 U. S. 371; *Bank of U. S.* v. *Dandridge,* 25 U. S. 112.

The rule with respect to laches is established by the following authorities, ignored by the court below whose attention was directed to them: *Industrial Savings & Loan Co.* v. *Plummer,* 84 N. J. Eq. 184; *DeGrauw* v. *Mechan,* 48 N. J. Eq. 219; *Coles* v. *Vanneman,* 51 N. J. Eq. 323; *Chetwood* v. *Berrian,* 32 N. J. Eq. 203, aff'd 517; *Bennett* v. *Piatt,* 85 N. J. Eq. 436, aff'd 802; *Doughty* v. *Doughty,* 10 N. J. Eq. 347; *Soper* v. *Cisco,* 85 N. J. Eq. 165; *Hendrickson* v. *Hendrickson,* 42 N. J. Eq. 657; *Trustees* v. *Gilbert,* 12 N. J. Eq., 78; *Rabe* v. *Dunlap,* 51 N. J. Eq. 40; *Crawford* v. *Lees,* 84 N. J. Eq. 324; *Pine* v. *Gardner,* 103 N. J. Eq. 69; *Wilkinson* v. *Sherman,* 45 N. J. Eq. 413, aff'd 47 N. J. Eq. 324; *McCartin* v. *Traphagen,* 43 N. J. Eq. 323, aff'd 45 N. J. Eq. 265; *Stout* v. *Seabrook's Executors,* 30 N. J. Eq., 187, aff'd 32 N. J. Eq. 826; *In Re Leupp,* 105 N. J. Eq. 49, 62; *Mulford* v. *Finch,* 11 N. J. Eq. 16; *Ames* v. *Bank of Nutley,* 118 N. J. Eq. 228, aff'd 119 N. J. Eq. 466; *Ross* v. *Savings Investment & Trust Co.,* 120 N. J. Eq. 87, aff'd 123 N. J. Eq. 288; *Backes* v. *Crane,* 87 N. J. Eq. 229; *McAllister* v. *McAllister,* 120 N. J. Eq. 407, aff'd 121 N. J. Eq. 264.

The court avoided the application of the estoppel rule by saying that Broad "would not be estopped because of acquiescence * * * because Broad never knew of Warren's identity with Valco" (R. I., 87), which is a finding contradicting the admission of Broad in paragraph 7 of its bill of complaint (R. I., 32), that it did, and of the overwhelming evidence, under oath and by way of exhibits, proving that it did. Broad was bound by its pleading. *Hageman* v. *Brown,* 76 N. J. Eq. 126, and so was the court, which had no right, by a finding of fact contrary to it, to enter a decree for Broad.

The court in avoiding the application of the rule of estoppel, said:

> "There was no estoppel after the Belfattos appeared, as I am satisfied from the evidence that they had not sufficient information relative to Warren's conduct with respect to his acquisition of the mortgage which would put them on notice" (R. I, 87),

thus ignoring the uncontradicted evidence that Warren fully informed them in September, 1938 (R. III, 785, 788), and that Collins fully informed them on January 20, 1939 (R. III, 863); and the letter from Warren to G. M. Belfatto of July 10, 1939 (Ex. D32, R. VII, 2140-778).

The court improperly distinguished the applicable decision of *Keasbey* v. *Wilkinson,* 51 N. J. Eq. 29, as shown herein under (b).

With respect to laches the record shows that during the five and a half years after March 19, 1934 when, as the evidence and exhibits show, Barnet was fully apprised of the entire mortgage transaction, the ownership of Valco stock by Mrs. Warren, and of Warren's performance of services under his contract with Broad which, on its behalf, Barnet accepted, that he never voiced any complaint or criticism, of any act of Warren, nor has any other stockholder of Broad holding stock at that time.

Barnet's will left all of his estate to his widow (Ex-D11, R. VII, 2111-1201), and by her will, her stock and that of Barnet passed to her niece Gladys Belfatto (Ex. D12, R. VII, 2112-2172) who was not related to Barnet, and it is her brother and father, both attorneys, and no one else, who are responsible for this suit.

As before stated, the record shows that they knew of the entire transaction concerning the purchase of the mortgage, of the contract of Warren, and of the services thereunder, when they induced Warren to become a director and secretary of Broad, and gave to him, as the representative of Mrs. Warren's Valco interest, joint control over Broad's bank account (Ex. D244, R. VIII 2588-1977, Ex. D245, R. VIII 2591-1978). After this meeting the Belfattos continued to permit Warren to perform his contract with Broad and accepted his services thereunder up to the time of trial.

The bill of complaint was filed March 4, 1942, eight years and one month after the transaction, about which complaint is made, three and a half years after the Belfattos were fully informed by Warren of the transaction and his contract, three years and two months after Collins likewise informed them, two years and six months after Barnet's death, six years after Greenberg's death, and after Tillie O. Barnet had died, those so dying being essential witnesses for petitioners. Mrs. Barnet died before trial. She was an essential witness. The most serious result from the delay in instituting this suit was the loss of Stanton's memory (he being the sole surviving director who attended the meeting of March 19, 1934, at which the contract was made with Warren), as to the discussion and occurrences at that meeting (R. I, 243, 255, 325, 327-331, 338). The lapse of time which caused Stanton to fail to recollect the occurrences at that meeting denied the petitioners the benefit of his testimony with respect to the making of the contract, as well as to Broad's complete knowledge of the mortgage transaction.

The Vice Chancellor excused his failure to apply the rule of laches because he said: "The delay was not caused by the complainants as the Belfattos had difficulty in finding a solicitor to represent them".

This is not a lawful reason because the Belfattos are both lawyers, one then a member of the bar for 42 years and the other for 10 years (Ex. D33, R. VII, 2148a-778), and it does not take three and one-half years to hire a New Jersey lawyer to prosecute a just cause. They had drawn a bill of complaint as far back as June 1939, demanding the cancellation of the mortgage and an accounting of the money paid to Valco, which is the exact relief sought by the bill of complaint in this cause and accomplished by the decree herein (Exs. VII, D21, R. 2126-777, D29, R. 2138-777, D36, R. 2153-778, D40, R. 2162-818, C4, R. 2002-159).

The Belfattos took their bill of complaint to Carpenter, Gilmour & Dwyer, Meyer Ruback, former Vice Chancellor John J. Fallon and Carey & Lane, requesting their services as counsel, all of whom after investigation, failed to proceed on their behalf. All of the testimony before cited and all of the exhibits in Appendix C were ignored by the Court.

The rules of estoppel, acquiescence and laches have been adopted by the courts everywhere to enable a court to be certain that it may dispense justice where claims are stale. The court should have applied the decisions heretofore cited. The said rules are applied by the Courts of all states; even in New Jersey, except in the instant case where Warren is a litigant. The rulings of the court in these respects were likewise based upon its findings of fact unsupported by evidence and its failure to accept uncontradicted evidence in violation of the binding precedents cited under (b) hereof.

It is clear that the court's failure to apply the rules of estoppel, acquiescence and laches in the instant case resulted in the denial of fundamental justice to petitioners, resulting in a denial of due process of law under the Fourteenth Amendment.

(g)

The Fourth Defense of the Answer (R. I, 49), includes a prayer that if the decree cancel the mortgage that it be conditioned on Broad compensating Warren for his services rendered to the complainant for nine years. The decree (R. I, 94) refers the cause to a Special Master merely to ascertain the sum in excess of $55,000 which had been paid by Broad to Valco, or Warren, with interest thereon and orders that Valco and Warren pay that sum to Broad. Broad's acceptance of Warren's services (R. VI, VI) was not explained by it, and the court should not have ignored them. Having accepted the benefits from Warren's services for those years, which were rendered upon the faith of the validity of the mortgage, if the mortgage be canceled the decree should provide for the payment by Broad to Warren of the value of those services.

The Special Master found that the payment over $55,000 amounted to $49,014.11, and that interest thereon to April 10, 1945 amounted to $24,193.62, or a total of $73,207.73, to be paid by Warren and Valco to Broad, with interest from April 10, 1945, which is running at the rate of $4,392.46 per annum.

The record discloses that there were indebtednesses of Broad to Warren and to Valco other than for Warren's services. With interest to April 10, 1945, they amounted to $83,570.45. This indebtedness to Valco and to Warren is largely shown upon complainant's own Exhibit C4 (R. VII, 2002-159), and also by Exhibits D163, (R. VIII,

2440-1488); D188 (R. VIII, 2449-1667); D170 and D171 (R. VIII, 2451, 2452-1546); D20 (R. VIII, 2589-799); C3 (R. VII, 1999-156), and by testimony (R. IV, 1139-1143).

The failure of the court below to consider this evidence and to offset the indebtedness of Broad to Valco and Warren against the amount it decreed to be due from them to Broad, also violates the binding precedents cited under (b) herein, and violated the rights of petitioners to due process of law.

Conclusion

We submit that the orders and decree of the Courts below, in the stated respects, and for the reasons urged, violated the fundamental rights of petitioners to justice.

WHEREFORE, it is respectfully requested that this petition for a writ of certiorari to the New Jersey Court of Errors and Appeals be granted.

JOHN WARREN,
Counsel for Petitioners.

Appendix A

New Jersey Constitution

Article I

1. *Natural and unalienable rights.* All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

2. *Political powers.* All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it.

21. *Saving clause.* This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people.

New Jersey Statute
R.S. 2:26-193

Article 10—Disqualification of Judge

2:26-193 What Constitutes. No judge of any court shall nominate or strike a jury or sit on the trial of or argument of any matter in controversy in a cause pending in his court, when he:

a. Is related in the third degree to any of the parties to the action, which degree shall be computed as at common law; or

b. Has been attorney of record or counsel for a party to such action; or

c. Has given his opinion upon a matter in question in such action; or

d. Is interested in the event of such action.

This section shall not be construed to prevent a judge from sitting on such trial or argument because he has given his opinion in another action in which the same matter in controversy came in question or on any question in controversy in the pending action in the course of previous proceedings therein, or because the board of chosen freeholders of a county or municipality in which he is a resident or liable to be taxed are or may be parties to the record or otherwise interested.

Appendix B

2 PHOTOSTATS

(See opposite ☞)